EYM King of Missouri, LLC d/b/a Burger King *and* Workers Organizing Committee—Kansas City.
Case 14–CA–188832

January 29, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On September 29, 2017, Administrative Law Judge Christine E. Dibble issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. January 29, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Rebecca Proctor, Esq., for the General Counsel.
John L. Ross, Esq., for the Respondent.
Fred Wickham, Esq., for the Charging Union.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Overland Park, Kansas on June 30, 2017. The Workers' Organizing Committee—Kansas City ("WOCKC/Union") filed the charge in case number 14–CA–188832 on November 28, 2016.[1] The General Counsel issued the complaint on March 28, 2017. On April 6, 2017, EYM King of Missouri, LLC d/b/a Burger King ("the Respondent") filed a timely Answer to the complaint and notice of hearing. On June 27, 2017, the Respondent filed an amended Answer.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act ("NLRA/the Act") when: (1) on or about November 28, the Respondent, through Wendell Toombs ("Toombs"), threatened employees with discipline up to and including termination if they engaged in a protected work stoppage; and (2) told employees that after he terminated then for engaging in a protected work stoppage, he would falsify the reasons for their terminations.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, engaged in the retail operation of Burger King franchise restaurants selling food and beverages to the general public, including at its restau-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and, as further explained below, find no basis for reversing the findings.

The complaint alleges that the Respondent, through General Manager Wendell Toombs, violated Sec. 8(a)(1) by threatening to discharge employees for engaging in a protected strike and then falsify the reasons for the discharges. Employee Khadijah Brown testified that Toombs made the threats, but Toombs vigorously denied Brown's version of events. The judge found Brown and Toombs to be "equally credible on the issue of whether Toombs made the threatening statements," and that there was "little to nothing in the record to indicate [that] Brown's testimony is likely to be more credible than Toombs' testimony or vice versa." In these circumstances, we agree with the judge that the General Counsel failed to meet his burden to establish that the Respondent violated the Act. See *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), enfd. mem. 272 Fed. Appx. 381 (5th Cir. 2008); *Central National Gottesman*, 303 NLRB 143, 145 (1991); *Iron Mountain Forge Corp.*, 278 NLRB 255, 263 (1986).

The General Counsel argues for the first time in his exceptions brief that the Respondent, through General Manager Toombs, coercively interrogated employees in violation of Sec. 8(a)(1) by asking employees questions about their intention to strike. We find no merit in this exception, as this allegation was not raised in the complaint or fully litigated during the hearing. See *Pellegrini Bros. Wines, Inc.*, 239 NLRB 1220, 1220 fn. 2 (1979).

In affirming the judge's findings, we do not rely on her citation to *Brighton Retail, Inc.*, 354 NLRB 441 (2009), or *Bloomfield Health Care Center*, 352 NLRB 252 (2008), enfd. mem. 372 Fed. Appx. 118 (2d Cir. 2010), as these cases were decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

[2] We have corrected the judge's inadvertent error of including as an appendix a notice to employees and shall remove the notice.

In view of our disposition, we deny as moot the Respondent's pending motion to reopen the record to admit new evidence.

[1] All dates are in 2016 unless otherwise indicated.

[2] These allegations are alleged in paragraphs 5(a) and (b) of the complaint.

rants located at 1102 East 47th Street, Kansas City, Missouri. During the 12-month period ending November 20, the Respondent derived gross revenues in excess of $500,000. The Respondent also purchased and received at its facilities in Missouri goods valued in excess of $5000 directly from points outside of the State of Missouri and remitted royalty and advertising fees on behalf of its Missouri facility valued in excess of $5000 to the Burger King Corporation, which is the franchisor of the BURGER KING® system, and is headquartered in the State of Florida. I find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation and Managerial Staff

At some point, the Respondent assumed operation of the restaurant at 1102 E. 47th Street in Kansas City, Missouri (47th Street). (Tr. 70.)[3] During the relevant timeframe, the Respondent employed approximately 40 employees at its 47th Street Burger King ("BK"). Due to the high turnover rate among the workforce at the restaurant, each week 2 to 3 people were hired to replace the workers who quit or came to work late.

As part of its 47th Street operation, the Respondent employed a general manager, shift managers, cashiers, cooks, a porter, and various other crew members. Since April 20, Toombs has worked for the Respondent as the general manager of the 47th Street Burger King restaurant.[4] Between about March 26, 2015 through about March 7, 2017, Sheeba Greer ("Greer") was a shift manager at the same location. From July 19 through about February 21, 2017, Cornelius McFadden ("McFadden") was a manager in training at the 47th Street BK; and on September 10, 2015, Quashae Roper[5] ("Roper") began as a shift manager at the 47th Street BK. Crew members at 47th Street, among others, included Khadijah Brown ("Brown"), Shyaine Hughes ("Hughes"), Joshlin Woodward ("Woodward"), Laneqwa Williams ("Williams"), Rahman Sallee ("Sallee"), and Shannon Ruth ("Ruth").

B. Conversation on November 28 between employees and Toombs

There are few undisputed facts in this case. On November 28, a conversation was held among a group of employees at work about a one day strike[6] scheduled for the next day sponsored by WOCKC. Toombs interjected himself into the conversation. After some discussion, everyone returned to work. The same day, at approximately 3pm, Jeremy Al-Haj ("Al-Haj"), a union organizer with Stand-Up KC, came to the restaurant to meet with several of the employees. Brown was one of the employees who spoke to him, and she told him that she feared being fired. Both Brown and Williams asked Al-Haj if they could be fired for going on strike. He informed them that under federal law, regardless of their length of employment, they had a right to strike without retaliation from their employer. Al-Haj returned to the 47th Street BK on November 28, at about 6pm or 7pm to review Brown's concerns about the possibility of being fired if she participated in the strike the next day, and to decide whether a charge should be filed with the Board.

On November 29, several of the Respondent's employees participated in the strike on November 29, and returned to work without being subject to disciplinary action or termination. An unconditional offer to return to work form was placed in Toombs office where he received it when he got to work on November 30. It included, among other striking employees, the names of Brown, Williams, Roper, and Hughes.[7]

Toombs' and Brown's testimonies of the November 28 discussion differ, thereafter, on almost every relevant point. Brown testified that on November 28, when she arrived for work at 2pm[8] Roper, Woodward, Williams and Hughes were having a discussion with Toombs. She contends that she joined in the conversation because she heard Toombs tell the employees that he was going to fire anyone who participated in the one day strike the union had scheduled for the next day. In response, she told Toombs that he could not fire them for going on strike and Roper agreed with her. Brown testified that Toombs allegedly acknowledged that Roper, Hughes, and Woodward could strike because they were beyond their probationary period; but Brown and Williams, as probationary employees, were precluded from participating in the strike. She claimed Toombs also told her, Roper, Hughes, Williams, and Woodward that: (1) he would wait one or two weeks before firing them so that it did not look like retaliation for their participation in the strike; (2) he did not need a reason to fire them; and (3) he hoped "Stand-Up KC" had new jobs lined up for them. According to Brown, the conversation ended after Toombs made these statements and everyone returned to work. Brown testified that she continued the discussion with Roper and McFadden who said Toombs was simply trying to frighten the employees into not attending the strike.[9] Moreover, Brown

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "CP Exh." for the Charging Party's exhibit; "R. Exh." for the Respondent's exhibit; "GC Br." for the General Counsel's brief; "CP Br." for the Charging Party's brief; and "R. Br." for the Respondent's brief.

[4] Toombs normally arrived to work at 4:30 a.m. or 5 a.m. and left at 2 p.m. or 3 p.m.

[5] Toombs provided credible, uncontroverted testimony that during the relevant time period, Roper had transferred to another BK store and was no longer working at the 47th Street location.

[6] I have used "strike" and "work stoppage" interchangeably throughout this decision.

[7] Toombs provided undisputed testimony that none of the employees who struck on November 29, except for Woodward and Robert Hill, are currently employed at the 47th Street BK. There is no evidence, however, that the employees were terminated or voluntarily left because of their strike activity.

[8] Brown was employed at the Respondent's 47th Street location from mid-November 2016 to early January 2017 and was still a trainee on November 28. Brown was regularly scheduled to work daily from 2 p.m. to 1 p.m., with the exception of Sunday when she worked from 11 a.m. to 6 p.m. Monday was her normal "off" day.

[9] On direct examination, Brown testified about the substance of her conversation with Roper and McFadden. The Respondent objected to this testimony on the basis that it was hearsay. I allowed the testimony

insists that Toombs never assured them that despite his comments that he would not discipline or discharge them for participating in the strike.

Toombs vigorously denied Brown's version of the facts. Toombs testified that on November 28, he heard several employees discussing the strike scheduled for the next day. Toombs joined the conversation to ask them if they were going to strike the following day. He testified that a few of the employees responded yes because they would receive $50 for participating in the strike. Toombs stated that when he asked them why they were striking, again a few responded that it was because they would be paid $50. At this point, Toombs claimed to have asked the employees to notify him if they were going to participate in the November 29 strike so that he could have extra employees cover the strikers' shifts. He admits that he could not recall which employees, except possibly Shannon Ruth ("Ruth"), participated in the conversation on November 28. (Tr. 35–37.) However, Toombs insisted that Brown was not among the group of employees discussing the strike, nor was she at work on November 28. He appeared to base his recollection of who participated in the November 28 conversation on the work schedule at R. Exh. 1.

I credit Brown's testimony that she was at the 47th Street BK on November 28 prior to 3pm because she had a corroborating witness, Al-Haj. Although he was not able to provide firsthand corroborating testimony about the substance of the November 28 conversation and which employees were present, Al-Haj was able to give undisputed testimony that he met Brown at the restaurant on November 28 to review her complaint about Toombs alleged threatening statements. His testimony corroborated only that she was at the restaurant, but not that she was working or scheduled to work that day.

Toombs could not recall who, specifically, participated in the November 28 conversation, thus diminishing the weight of his testimony on this point. Nevertheless, the Respondent introduced a copy of the weekly schedule for the date at issue which reveals that Brown, Roper, Hughes, and Williams were not on the schedule to work. (R. Exh. 1.) Toombs testified that Roper had been transferred to a different restaurant prior to November 28 so she would not have been employed at the 47th Street location on November 28. Roper, nevertheless, continued to be employed by the Respondent on November 28. According to Toombs, Williams stopped coming to work but admits she was still employed with the Respondent from November 24 – 30. The General and Counsel and Charging Party argue that R. Exh. 1 should not be given any weight because it is inaccurate. See GC Br. 8–14; CP Br. 7–10. I find that R. Exh. 1 has minimal evidentiary value because: (1) the complaint alleges that the Respondent, through Toombs, made threatening comments to several of its employees. Toombs admits he heard a group of employees discussing the November 29 strike and asked them questions about it. The relevant inquiry is whether he made the alleged threatening statements. Brown accused Toombs of making the statements and I was able to credit her testimony that she was at the restaurant during the period in question, independent of R. Exh. 1. Moreover, the merits of the case will be based entirely on credibility findings. Consequently, I do not find it necessary to rule on the credibility of R. Exh. 1.

I find that Brown and Toombs appeared equally credible on the issue of whether Toombs made the threatening statements. Neither was superior to the other in terms of their demeanor. Moreover, I find little to nothing in the record to indicate the Brown's testimony is likely to be more credible than Toombs' testimony or vice versa. Since the General Counsel has the burden of proving credibility, I credit Toombs' version of the conversation that occurred with him and a group of employees on November 28; and his denial that he made the alleged threatening statements. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

III. DISCUSSION AND ANALYSIS

The General Counsel argues that the merits of the case rest entirely on the credibility of two main witnesses: Brown and Toombs. According to the General Counsel, Brown is more credible because: (1) Brown's testimony was corroborated by witnesses who were more credible than the Respondent's witnesses; (2) the totality of the circumstance makes it more likely than not that Brown was at work and participated in the November 28 conversation, thus discrediting Toombs' testimony on this point; and (3) the Respondent's exhibit 1 is not accurate, and thus not credible.

The Respondent counters that the General Counsel has failed to meet his burden of proof because: (1) the General Counsel's case rests entirely on the uncorroborated testimony of one witness, Brown; and (2) Brown's testimony was internally inconsistent and contradicted by other credible evidence.

The General Counsel argues that, taken in context, Toombs' alleged statements to employees would "reasonably tend to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009). The Board has established an objective test for determining if "the employer

with the caveat that I would give it the weight it deserved. Based on my review of the evidence, the Board rules, and the federal rules of evidence, I find that Brown's testimony on this point is given no weight. The best evidence would have been Roper's and, or McFadden's testimonies; and the General Counsel provided no reason for failing to call them to testify about the substance of the conversation. Consequently, Brown's testimony on this point is nothing more than hearsay with no obvious exception to the hearsay rule. Therefore, it is given no weight.

engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara News-Press*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8 (a)(1) of the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010).

Based on the evidence, I find that the General Counsel has failed to establish that the Respondent, through Toombs, made the alleged threatening statements for the reasons discussed below.

As previously noted in the facts section of the decision, the General Counsel failed to establish that Brown was a more credible witness than Toombs. Moreover, the General Counsel failed to produce corroborating witnesses to overcome the deficits with Brown's testimony and overall demeanor. A party's failure to explain why it did not call the favorable witness may support drawing an adverse inference. See *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). Ultimately, however, the judge has discretion to decide whether an adverse inference is warranted when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. The Board and the Federal courts have also consistently held that it is not an abuse of discretion if the judge decides not to take an adverse inference against a party for not calling a witness even if that witness is the party's former supervisor. *Advocate South Suburban Hospital v. NLRB*, 486 F.3d 1038, 1048 and fn. 8 (7th Cir. 2006) (adverse inference warranted only when the missing witness is peculiarly in the power of the other party to produce); *Christie Electric Corp*., 284 NLRB 740, 748 fn. 137 (1987) (declining to draw an adverse inference for the failure to call a former supervisor). In the case at issue, Roper, Woodward, Williams, and Hughes could have been assumed to be favorably disposed towards the General Counsel's case. If called by the General Counsel, one or more of the 4 witnesses might have supported in whole or in part Brown's version of the November 28 conversation with Toombs and who was present to hear him make the alleged statements.

Even if a judge decides not to draw an adverse inference, the failure of the General Counsel to call identified corroborating witnesses may be a consideration in the judge's determination of whether the General Counsel's case has been significantly weakened, and thus a factor which leads to a finding that the General Counsel has failed to meet the burden of proof. See *Stabilus, Inc*., 355 NLRB 836, 841 fn. 19 (2010) ("The lack of corroboration from Lockridge weakens the General Counsel's case."). The Board has consistently held that the judge may consider the General Counsel's failure to call a potentially corroborating witness in deciding whether a violation of the Act has occurred. See *C & S Distrib.,* 321 NLRB 404, 404 fn. 2 (1996) ("a judge may properly consider the failure to call an identified, potentially corroborating witness … as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred."); citing *Queen of the Valley Hospital*, 316 NLRB 721, 721 fn. 1 (1995) (same).

The General Counsel has the ultimate burden of proof. In the matter at hand, it is the General Counsel's responsibility to prove by a preponderance of the evidence that Toombs made the threatening statements attributed to him by Brown. Since I previously found that based on their comparative demeanor, neither Toombs nor Brown was superior; it was incumbent upon the General Counsel to produce alternate persuasive evidence. For example, the General Counsel could have produced any of the employees that Brown testified were present when Toombs allegedly made the threatening statements or any other corroborating evidence. While the General Counsel argues that Al-Haj corroborated Brown's version of events, the evidence indicates otherwise. Al-Haj simply testified to what Brown told him. He was not actually present when the conversation involving several employees and Toombs occurred so he has no first-hand knowledge of what was said. This is a "he-said-she-said" situation with equally credible witnesses and no additional persuasive evidence to break the tie. Consequently, Board law holds that I must find the General Counsel did not carry its burden of proof. See *Iron Mountain Forge Corp*., 278 NLRB 255, 263 (1986).

Accordingly, I find that the General Counsel failed to meet its burden of proof regarding this allegation and recommend that paragraphs 5(a) and (b) of the complaint be dismissed.

Dated: Washington, D.C. September 29, 2017